HARIS FATILLAH MOHD IBRAHIM v. SURUHANJAYA PILIHAN RAYA MALAYSIA

COURT OF APPEAL, PUTRAJAYA
TENGKU MAIMUN TUAN MAT JCA
AHMADI ASNAWI JCA
ZAMANI A RAHIM JCA
[CIVIL APPEAL NO: W-01(A)-271-08-2015]
10 JANUARY 2017

CONSTITUTIONAL LAW: *Election – Delimitation exercise – Application for relevant information by appellant to make informed representation – Failure of respondent to supply relevant information – Application for declaratory reliefs via originating summons ('OS') – Whether appellant had right to information relating to changes made to Parliamentary and State Constituencies – Whether reliefs sought outside scope and functions of respondent – Whether court had jurisdiction to grant reliefs sought – Whether appellant had requisite locus standi to initiate proceedings – Whether OS premature and abuse of court process – Federal Constitution, art. 113*

ELECTION: *Election Commission – Delimitation exercise – Application for relevant information by appellant to make informed representation – Failure of respondent to supply relevant information – Application for declaratory reliefs via originating summons ('OS') – Whether appellant had right to information relating to changes made to Parliamentary and State Constituencies – Whether reliefs sought outside scope and functions of respondent – Whether court had jurisdiction to grant reliefs sought – Whether appellant had requisite locus standi to initiate proceedings – Whether OS premature and abuse of court process – Federal Constitution, art. 113*

The appellant, a registered voter in the Parliamentary Constituency of Petaling Jaya Selatan P105 and the State Constituency of the State Legislative Assembly of Bukit Gasing, was among the majority of 52% popular voters during the Thirteenth General Election ('13th GE'). The respondent announced to the public of its intention to gather information to commence a nationwide delimitation exercise in accordance with ss. 4 and 5 of the 13th Schedule of the Federal Constitution ('FC'). Pursuant to the said exercise, the public would be allowed to make representations after the publication of the delimitation notice by way of *gazette* at identified areas and in the local newspapers. By a letter dated 8 December 2014, the appellant wrote to the respondent requesting from the respondent to be supplied with all relevant information to enable him to make an informed representation relating to the said process. The respondent, however, failed and/or neglected to supply the relevant information to the appellant. As such, the appellant filed an originating summons ('OS') to obtain the relevant information pertaining to the proposed delimitation. The High Court dismissed the appellant's OS. Hence the present appeal. The issues that arose for determination, *inter alia*,

were (i) whether the appellant had the requisite *locus standi* to initiate the proceedings; and (ii) whether the application for the declarations ought to be granted in light of the respondent's functions and powers as provided by the Federal Constitution.

Held (dismissing appeal with costs)
Per Zamani A Rahim JCA delivering the judgment of the court:

(1) In the OS and in the affidavit of support of the application, the appellant merely identifies himself as a registered voter of Petaling Jaya Selatan Parliamentary Constituency and Bukit Gasing State Constituency. Nowhere in the pleadings did the appellant identify a controversy or a ripe issue between himself and the respondent or that his constitutional right has been infringed. Clearly, there is no controversy between the appellant and the respondent, whether on the facts or in law. The application is clearly shorn of any cause of action against the respondent. (paras 21, 22 & 25)

(2) The application commenced by the appellant do not involve any rights which is being denied by the respondent and there is no issue of the rights of the appellant being deprived by the respondent. The pleading is clearly flawed as it lacks the fundamental issue of a cause of action for the simple reason that the reliefs prayed for are not within the parameters of the functions of the respondent. The respondent is only to execute its functions and powers as provided under art. 113 of the Federal Constitution. Therefore, the appellant's OS was without merit and the application should be refused *in limine*. (paras 31, 34, 35 & 47)

(3) The duties and responsibilities of the respondent have been specified by art. 113 of the FC and s. 5 of the Election Act 1958. There is nothing in both the Federal Constitution and the Election Act 1958 or other express statutory provisions which require the respondent to do what the appellant is asking for from the court. The appellant's action is clearly seeking a 'clocked declaration', meaning a declaration with improper motive. The court cannot flagrantly override an express provision of the Federal Constitution. (paras 48 & 49)

Bahasa Malaysia *Headnotes*

Perayu, seorang pengundi berdaftar di kawasan Parlimen Petaling Jaya Selatan P105 dan kawasan Dewan Undangan Negeri Dewan Undangan Negeri Bukit Gasing, adalah antara pengundi popular majoriti 52% semasa Pilihan Raya Umum Ketiga Belas ('PRU 13'). Responden mengumumkan kepada orang awam mengenai niatnya untuk mengumpul maklumat untuk memulakan satu proses persempadanan semula di seluruh negara mengikut ss. 4 dan 5, Jadual ke-13 Perlembagaan Persekutuan ('PP'). Berikutan proses tersebut, orang awam akan dibenarkan untuk membuat representasi selepas penyiaran notis persempadanan semula melalui *warta* di kawasan yang

ditentukan dan dalam akhbar tempatan. Melalui surat bertarikh 8 Disember 2014, perayu telah menulis kepada responden dan meminta daripada responden untuk dibekalkan dengan semua maklumat yang relevan untuk membolehkan perayu membuat representasi berkaitan dengan proses tersebut. Responden walau bagaimanapun gagal dan/atau cuai untuk membekalkan maklumat yang dipohon kepada perayu. Oleh itu, perayu memfailkan saman pemula ('SP') untuk mendapatkan maklumat berkaitan persempadanan yang dicadangkan. Mahkamah Tinggi menolak SP perayu. Oleh itu, rayuan ini. Isu-isu yang dibangkitkan untuk pertimbangan, antara lain, adalah (i) sama ada perayu mempunyai *locus standi* yang diperlukan untuk membawa prosiding ini; dan (ii) sama ada permohonan bagi pengisytiharan patut diberikan berdasarkan fungsi dan kuasa responden sebagaimana yang diperuntukkan oleh Perlembagaan Persekutuan.

Diputuskan (menolak rayuan dengan kos)
Oleh Zamani A Rahim HMR menyampaikan penghakiman mahkamah:

(1) Dalam SP dan di dalam afidavit sokongan permohonan perayu, perayu hanya memperkenalkan dirinya sebagai pengundi berdaftar Petaling Jaya Selatan kawasan Parlimen dan Dewan Undangan Negeri Bukit Gasing. Perayu tidak mengenal pasti atau menyatakan dalam pliding kontroversi atau isu antara dirinya dan responden atau hak perlembagaannya yang telah dilanggar. Jelas sekali, tidak ada kontroversi antara perayu dan responden, sama ada fakta atau undang-undang. Permohonan perayu jelas tidak menunjukkan apa-apa kausa tindakan terhadap responden.

(2) Permohonan yang dimulakan oleh perayu tidak melibatkan apa-apa hak yang dinafikan oleh responden dan tidak ada isu hak perayu yang dilucutkan oleh responden. Pliding perayu adalah cacat kerana ia tidak mempunyai isu asas suatu kausa tindakan atas alasan permohonan yang dipohon tidak berada dalam parameter fungsi responden. Responden hanya perlu melaksanakan fungsi dan kuasa sebagaimana yang diperuntukkan di bawah per. 113 Perlembagaan Persekutuan. Oleh itu, SP perayu adalah tanpa merit dan permohonan tersebut harus ditolak *in limine*.

(3) Tugas dan tanggungjawab responden telah diperuntukkan oleh per. 113 PP dan s. 5 Akta Pilihan Raya 1958. Tidak ada apa-apa dalam Perlembagaan Persekutuan dan Akta Pilihan Raya 1958 atau peruntukan berkanun lain yang memerlukan responden melakukan seperti yang dipohon oleh perayu daripada mahkamah. Tindakan perayu jelas memohon 'clocked declaration', yang bermaksud pengisytiharan dengan motif yang tidak wajar. Mahkamah tidak boleh mengatasi suatu peruntukan nyata Perlembagaan Persekutuan.

Case(s) referred to:

Abdul Razak Ahmad v. Kerajaan Negeri Johor [1994] 2 MLJ 297 ***(refd)***

Ahmad Bahrom Datuk Hj Abu Bakar Titingan v. Tan Sri Hj Mohd Sunoh Marso & Ors [1985] 1 LNS 3 SC ***(refd)***

Boyce v. Paddington Borough Council [1903] 1 Ch 109 ***(refd)***

Caxton (Kelang) Sdn Bhd v. Susan Joan Labrooy & Anor [1987] 2 CLJ 36; [1987] CLJ (Rep) 504 HC ***(refd)***

Dato' Menteri Othman Baginda & Anor v. Dato' Ombi Syed Alwi Syed Idrus [1984] 1 CLJ 28; [1984] 1 CLJ (Rep) 98 FC ***(refd)***

Government of Malaysia v. Lim Kit Siang & Another Case [1988] 1 CLJ 219; [1988] 1 CLJ (Rep) 63 SC ***(refd)***

Loh Kooi Choon v. Government of Malaysia [1975] 1 LNS 90 FC ***(refd)***

Namit Sharma v. Union of India [2013] 1 SCC 745 ***(refd)***

Ontario (Public Safety and Security) v. Criminal Lawyers' Association [2010] 1 SCR 815 ***(refd)***

Pengerusi Suruhanjaya Pilihanraya Malaysia v. See Chee How & Anor [2015] 8 CLJ 367 CA ***(refd)***

PP v. Kok Wah Kuan [2007] 6 CLJ 341 FC ***(refd)***

Russian Commercial and Industrial Bank v. British Bank for Foreign Trade Limited [1921] 2 AC 438 ***(refd)***

Sakapp Commodities (M) Sdn Bhd v. Cecil Abraham [1998] 4 CLJ 812 CA ***(refd)***

Sivarasa Rasiah v. Badan Peguam Malaysia & Anor [2010] 3 CLJ 507 FC ***(refd)***

Tan Sri Hj Othman Saat v. Mohamed Ismail [1982] 1 LNS 2 FC ***(refd)***

Tengku Jaffar Tengku Ahmad v. Karpal Singh [1993] 4 CLJ 183 HC ***(refd)***

The Attorney General of Hong Kong v. Zauyah Wan Chik & Ors And Another Appeal [1995] 3 CLJ 35 CA ***(refd)***

Legislation referred to:

Elections Act 1958, s. 5

Federal Constitution, arts. 10(1)(a), 113(2), 119, Thirteenth Schedule Part II, ss. 4(a), (b), 5

Rules of Court 2012, O. 15 r. 16

Rules of the High Court 1980, O. 15 r. 16

Specific Relief Act 1950, s. 41

Canadian Charter of Rights and Freedoms [Canada], s. 2(b)

Right to Information Act 2005 [Ind], s. 2(j)

The Constitution of India [Ind], art. 19

For the appellant - Malik Imtiaz, Surendra Ananth, Sreekant Pillai & Clinton Tan; M/s Sreekant Pillai

For the respondent - Suzana Atan, Natra Idris & Azizan Md Arshad; SFCs

[Editor's note: For the High Court judgment, please see Haris Fatillah Mohd Ibrahim v. Suruhanjaya Pilihanraya Malaysia [2016] 10 CLJ 382 (affirmed).]

Reported by Sandra Gabriel

JUDGMENT

Zamani A Rahim JCA:

Introduction

[1] This is an appeal against the decision of the High Court at Kuala Lumpur which dismissed the appellant's originating summons dated 19 January 2015. By the said originating summons, the appellant is seeking to obtain relevant information pertaining to the proposed delimitation of Parliamentary and State Constituencies ("delimitation exercise") to be carried out by the respondent pursuant to the notice to be issued under s. 4, Part II, Thirteenth Schedule of the Federal Constitution ("13th Schedule of the FC").

The Appellant's Originating Summons Before The High Court

[2] The appellant's originating summons before the High Court is for the following declaratory reliefs:

(a) that all the affected persons have the right to all information in relation to changes made to Parliamentary and State Constituencies where these people were registered voters or all other Parliamentary or State Constituencies;

(b) that all information which may be relevant ("the relevant information") including the recommendations or proposed recommendations ("the recommendations"), map or maps of the constituency, voting areas and the reasons for the proposed changes including all relevant documents used in support and/or justification of the proposed changes;

(c) that all the affected persons be conferred with the right to the relevant information in the form which would enable all the affected persons to make effective representations pertaining to the proposed recommendations under s. 5 of the 13th Schedule of the FC;

(d) that the respondent does not have the right or authority to restrict the right of examination of all the affected persons only to the physical examination for recommended proposals at the designated and fixed location in a constituency; and

(e) that the relevant information, including the publication of the information in digital form available *via* the respondent's web page or copies of the same be made available to the affected person, whether living in Malaysia or outside Malaysia at nominal costs, to enable the said affected persons to make effective representations within the time provided by s. 4(b) of the 13th Schedule of the FC.

[3] The application is supported by an affidavit affirmed by the appellant on 16 January 2015.

[4] In opposing the application, the respondent filed an affidavit in reply affirmed by Tan Sri Dato' Seri Abdul Aziz bin Mohd Yusof on 16 February 2015.

[5] The appellant's affidavit in reply affirmed by the appellant on 25 February 2015.

Background Facts

[6] Briefly, the background facts leading to the filing of the originating summons herein are produced below:

(a) The appellant averred that he is a registered voter in the Parliamentary Constituency of Petaling Jaya Selatan, P105, and the State Constituency of the State Legislative Assembly of Bukit Gasing. The appellant also averred that he was among the majority of 52% popular voters during the 13th General Election;

(b) Around October 2013, the respondent had announced to the public of its intention to gather information to commence a nationwide delimitation exercise in accordance with ss. 4 and 5 of the 13th Schedule of the FC;

(c) Pursuant to the said exercise, the public will be allowed to make representations after the publication of the delimitation notice by way of *gazette* at identified areas and in the local newspapers circulating in the constituencies;

(d) The representations can be made within one month of the gazetting of the delimitation notice at an identified area of a particular constituency;

(e) By a letter dated 8 December 2014 the appellant wrote to the respondent requesting from the respondent that he supplied with all relevant information to enable him to make an informed representations relating to the said process. This request was made under ss. 4 and 5 of the 13th Schedule of the Federal Constitution; and

(f) Despite the application having been made for the relevant information to be supplied to the appellant *vide* "exh. HF4" annexed to encl. 3, until the date of the filing of this originating summons, the respondent had failed and or neglected to supply the relevant information to the appellant.

[7] On 11 June 2015, Justice Asmabi binti Mohamad dismissed the appellant's originating summons. In essence, the learned High Court Judge decided as follows:

(i) The originating summons is neither an action commenced as representative action nor a public interest litigation;

(ii) The appellant had not satisfied the court that he has the legal standing or *locus standi* to commence the originating summons against the respondent. The originating summons did not involve any rights of the

appellant being affected and/or denied and there is already a scheme within the Federal Constitution for the purpose of the delimitation process;

(iii) The appellant had failed to demonstrate that he has the right under the Federal Constitution to the relevant information before the respondent undertake the delineation exercise;

(iv) The respondent in undertaking a review under art. 113 of the Federal Constitution is required to comply with procedure for the delimitation of constituencies provided in s. 4 of the 13th Schedule of the Federal Constitution;

(v) What the appellant was asking the court to declare was something beyond the scope of duty and/or responsibilities of the respondent under the Federal Constitution and/or compelling the respondent to perform a duty or function not provided by the Federal Constitution;

(vi) Whatever relevant information that the appellant would require to enable him to exercise his rights to make representation could be viewed in the proposed recommendations which would be made available once the same is open for inspection at the designated location. The Federal Constitution does not require the particulars to be inserted in the notice or the relevant information to be supplied to the appellant beforehand;

(vii) The proper forum to raise any complaints, shortcomings including adequacies and sufficiency of the particulars concerning a recommendation altering a constituency is at a local enquiry held upon representations objecting to such alteration made to the respondent. The court is not the proper forum;

(viii) Section 5 of the 13th Schedule provides statutorily the *locus standi* to raise representations and the place to raise the representations which is at the local enquiry conducted by the respondent; and

(ix) The declaratory reliefs sought by the appellant, if granted, would have the effect of declaring the respondent to do something which the respondent is not required under the Federal Constitution to do, something outside and beyond the scope or the function of the respondent under art. 113 of the Federal Constitution.

The Appeal

[8] Before us, learned counsel for the appellant canvassed the following grounds, *inter alia*:

(a) The learned High Court Judge misapprehended the correct approach to adopt in determining whether the appellant had the *locus standi* or standing to commence the originating summons against the respondent. The correct approach required the learned judge to consider whether the

declarations sought were of a nature that allowed for recourse to s. 41 of the Specific Relief Act 1950. If so, whether the appellant had a genuine interest in the matters sought: see *Tan Sri Haji Othman Saat v. Mohamed Ismail* [1982] 1 LNS 2; [1982] 2 MLJ 177;

(b) The principles in *Caxton (Kelang) Sdn Bhd v. Susan Joan Labrooy & Anor* [1987] 2 CLJ 36; [1987] CLJ (Rep) 504; [1988] 2 MLJ 604 was wrongly applied by the learned High Court Judge;

(c) The appellant has a genuine interest in the subject matter. He is a citizen of the country and is a registered voter. He is therefore entitled to participate in the processes provided for under the 13th Schedule of the FC;

(d) The right to information is implicit in the freedom of expression guaranteed under art. 10(1)(a) of the FC: see *Sivarasa Rasiah v. Badan Peguam Malaysia & Anor* [2010] 3 CLJ 507; [2010] 2 MLJ 333. This is in line with the constitutional jurisprudence of other Commonwealth court such as the Indian, Canadian and English courts;

(e) There is no need for any Federal legislation to recognise the freedom of information, as such legislation is not aimed at creating the right to information but rather, to facilitate that right and to strike a balance between competing interest: see *Ontario (Public Safety and Security) v. Criminal Lawyers' Association* [2010] 1 SCR 815;

(f) The information sought by the appellant was necessary for the meaningful exercise of free expression on matters of public or political interest within the sense expressed in *Ontario (supra)*;

(g) The court is invited to revisit the decision of this court in *Pengerusi Suruhanjaya Pilihanraya Malaysia v See Chee How & Anor* [2015] 8 CLJ 367 having regard to s. 4(a), 13th Schedule which must be construed by reference to art. 113(2) and art. 119 of the FC: see *Dato' Menteri Othman Baginda & Anor v. Dato' Ombi Syed Alwi Syed Idrus* [1984] 1 CLJ 28; [1984] 1 CLJ (Rep) 98; [1981] 1 MLJ 29; and

(h) The appellant is entitled to primary declarations sought, that is, (i) the proposed recommendations, (ii) the maps of relevant constituencies which include the polling districts, and (iii) the reasons for the proposed recommendations, which include the documents to support the same.

[9] The central issues in this appeal are first, whether the appellant has the requisite *locus standi* to bring the proceedings and secondly, whether the application for the declarations ought to be granted in light of the respondent's functions and powers as provided by the Federal Constitution.

Whether The Appellant Has The Requisite Locus Standi To Bring This Proceeding

[10] The appellant in its intitulement states that the application is filed pursuant to O. 15 r. 16 of the Rules of Court 2012 (ROC 2012). Order 15 r. 16 provides as follows:

> No action or other proceeding shall be open to objection on the ground that a merely declaratory judgment or order is sought thereby, and the court may make binding declarations of rights whether or not consequential relief is or could be claimed.

[11] In *Tengku Jaffar Tengku Ahmad v. Karpal Singh* [1993] 4 CLJ 183; [1993] 3 MLJ 156, one of the grounds relied by the defendant to strike out the case was on the *locus standi* of the plaintiff. The court held that the plaintiff lacked the locus to commence the action and His Lordship Justice Idris said at pp. 186-187 (CLJ); p. 163 (MLJ) as follows:

> ... I hold that the plaintiff, purely on the ground of being of the Malay race and a subject of the Sultan of Kelantan, is not clothed with the necessary *locus standi* since there does not seem to be any form of interference of his private right beyond that of any other Malays and subjects of the Sultan of Kelantan, a qualification which is essentially required to be proved.

[12] With regards to the application of O. 15 r. 16 of the RHC 1980, the plaintiff must be clothed with *locus standi*. His Lordship says at p. 188 (CLJ); p. 165 (MLJ):

> Counsel for the plaintiff refers to O 15 r 16 … He claims that a declaration sought under O. 15 r. 16 is not open to objection. I am afraid that I do not agree with him for it is an accepted rule of practice that a party must have the necessary *locus standi* before it is allowed to appear and be heard in legal proceedings.

[13] In *Abdul Razak Ahmad v. Kerajaan Negeri Johor* [1994] 2 MLJ 297, the plaintiff relied on O. 15 r. 16 of the RHC to resist the application of the defendant. Justice Haidar said at p. 307:

> Hashim Yeop Sani SCJ (as he then was) in *Government of Malaysia v. Lim Kit Siang* had occasion to say (at p. 40), 'O. 15 r. 16 of our Rules of the High Court 1980 cannot be made into a basis of jurisdiction for the court to entertain an action which is not properly before it.' This is in consonance with what was said by Viscount Dilhorne in *Gouriet v. Union of Post Office Workers & Ors* [1977] 3 All ER 70 that O 15 r 16 does not provide that an action will lie whenever a declaration is sought. It does not enlarge the jurisdiction of the court. It merely provides that no objection can be made on the ground that only a declaration is sought.

[14] In the present case, the respondent's objection to the originating summons is grounded on the issue of *locus standi* of the appellant to seek the declarations and not merely seeking declarations as such.

[15] The issue of *locus standi* is a threshold issue to be decided as to whether the appellant can institute and maintain any action, be it a private matter or a public interest litigation.

[16] The appellant seeks a series of declarations in relation to the review of the division of the Federation and the States into constituencies (delimitation of Parliamentary/State Constituencies) to be undertaken by the respondent.

[17] The respondent contends that the appellant lacks *locus standi* to come to court for the reliefs prayed for as there is no controversy between the appellant and the respondent as the appellant's right has not been affected.

[18] The most important feature of a declaratory judgment is that it is a discretionary remedy and as such, the court must carefully consider the circumstances and terms upon which the relief is sought.

[19] In the House of Lords case of *Russian Commercial and Industrial Bank v. British Bank for Foreign Trade Limited* [1921] 2 AC 438, Lord Dunedin observed at p. 447:

> that the granting of a mere declaration is a matter of discretion, and that that discretion ought to be shown in granting such declaration "sparingly", "with care and jealousy" and "with extreme caution." I confess that, to my mind, such expressions give little guidance …
>
> The rules that have been elucidated by a long course of decisions in the Scottish Courts may be summarised thus:
>
> The question must be a real and not a theoretical question; the person raising it must have a real interest to raise it; he must be able to secure a proper contradictor - that is to say, someone presently existing who has a true interest to oppose the declaration sought …

[20] The appellant must first show to the court that he has the necessary *locus standi* or standing in that he has a proper or tangible interest to seek the declarations. The traditional test for standing is set out by Buckley J in *Boyce v. Paddington Borough Council* [1903] 1 Ch 109 at p. 114:

> A plaintiff can sue without joining the Attorney General in two cases: first where the interference with the public right is such as that some private right of his at the same time interfered with (e.g. where an obstruction is so placed in a highway that the owner of premises abutting upon the highway is specially affected by reasons that the obstruction interferes with his private right of access from and to his premises to and from the highway); and, secondly, where no private right is interfered with but the plaintiff in respect of his public right, suffers special damage peculiar to himself from the interference with the public right.

[21] In the originating summons and in para. 1 of his affidavit in support of the application, the appellant merely identifies himself as a registered voter of Petaling Jaya Selatan Parliamentary Constituency and Bukit Gasing State Constituency.

[22] The appellant has not pleaded that there was any interference with his public right such that it also interfered with his private right or that he had suffered some special damage peculiar to himself from such interference. Nowhere in the pleadings does the appellant identify a controversy or a ripe issue between himself and the respondent or that his constitutional right has been infringed.

[23] It is to be noted that the declaratory reliefs that the appellant are seeking are not for himself but in general term for "aggrieved person" not identified or made plaintiff in the application. The originating summons and affidavit neither reflect that it is a representative action.

[24] There is no statement of fact in the appellant's affidavit to allege that his rights have been affected by the act of the respondent. There is also no allegation that the appellant's rights, if any, have been prejudiced by the act of the respondent.

[25] In the instant case, what is the appellant's cause of action as disclosed from his pleading against the respondent? Clearly, there is no controversy between the appellant and the respondent, whether on the facts or in law. The application is clearly shorn of any cause of action against the respondent.

[26] In *Government of Malaysia v. Lim Kit Siang & Another Case* [1988] 1 CLJ 219; [1988] 1 CLJ (Rep) 63, the Supreme Court held at p. 67:

> a cause of action is a statement of facts alleging that a plaintiff's right either at law or by statute, has in some way or another, been adversely affected or prejudiced by the act of the defendant in an action.

[27] Further, since the appellant is seeking for declaratory reliefs, the granting of such declarations is at the discretion of the courts and the discretion must be exercised judicially. In *The Attorney General of Hong Kong v. Zauyah Wan Chik & Ors And Another Appeal* [1995] 3 CLJ 35; [1995] 2 MLJ 620, Gopal Sri Ram JCA (as he then was) said at p. 51 (CLJ); p. 638 (MLJ):

> And no court will act in vain by granting meaningless declarations.

[28] In *Caxton*'s case, *supra*, Justice Siti Norma Yaacob (as Her Ladyship then was) referred to the book "*Declaratory Relief*," 2nd edn where the author, PW Young wrote about declaratory relief as follows:

> … six factors must be present before there can be a declaratory order. These are:
>
> (1) There must exist a controversy between the parties;
>
> (2) These proceedings must involve a "right";
>
> (3) These proceedings must be brought by a person who has a proper or tangible interest in obtaining the order, which is usually referred to as "standing" or "*locus standi*";

(4) The controversy must be subject to the court's jurisdiction;

(5) The defendant must be a person having a proper or tangible interest in opposing the plaintiff's claim;

(6) The issue must be ripe, i.e. it must not be of academic interest, hypothetical or one whose resolution would be of no practical utility.

[29] Thus, the appellant has failed to meet the above factors or conditions. More particularly there is no controversy between the appellant and the respondent.

[30] The function of the respondent has clearly been spelt out by art. 113 of the Federal Constitution, which includes the review process to be undertaken by the respondent in accordance with the principles laid down in the 13th Schedule.

[31] This application commenced by the appellant does not involve any rights which is being denied by the respondent. There is no issue of the rights of the appellant being deprived by the respondent.

[32] In *Sakapp Commodities (M) Sdn Bhd v. Cecil Abraham* [1998] 4 CLJ 812; [1998] 4 MLJ 651, this court reiterated the discretionary power of the court to grant declaratory reliefs and set out a variety of circumstances where declaratory relief may be denied in the exercise of this discretion as follows:

> Thus generally speaking, the court will not grant a declaratory judgment where an adequate alternative remedy is available or upon hypothetical issues or upon an issue of no practical consequence or where it may be premature to grant a declaration or where a plaintiff is guilty of laches or other inequitable conduct or where "clocked declaration", that is to say, a declaration for a collateral purpose or with an improper motive, is sought.

Whether The Application For The Declarations Ought To Be Granted In Light Of The Respondent's Functions And Powers As Provided By The Federal Constitution

[33] The respondent contends that the application ought to be dismissed with costs because the functions and duties of the respondent are as provided for under art. 113 of the Federal Constitution.

[34] The pleading is clearly flawed as it lacks the fundamental issue of a cause of action for the simple reason that the reliefs prayed for are not within the parameters of the functions of the respondent.

[35] The respondent is only to execute its functions and powers as provided under art. 113 of the Federal Constitution. Therefore, the reliefs prayed for by the appellant are clearly outside the scope of functions of the respondent.

[36] Article 113(2) of the Federal Constitution provides as follows: A

(i) Subject to para. (ii), the Election Commission shall, from time to time, as they deem necessary, review the division of the Federation and the States into constituencies and recommend such changes therein as they may think necessary in order to comply with the provisions contained in the 13th Schedule; and the reviews of B constituencies for the purpose of elections to the Legislative Assemblies shall be undertaken at the same time as the reviews of constituencies for the purpose of elections to the house of representatives;

(ii) There shall be an interval of not less than eight years between the C date of completion of one review, and the date of commencement of the next review, under this clause;

(iii) A review under para. (i) shall be completed within a period of not more than two years from the date of its commencement;

[37] The procedure for delimitation of constituencies is set out in part II D of the 13th Schedule which reads as follows:

Part II

PROCEDURE FOR DELIMITATION OF CONSTITUENCIES

4. Where the Election Commission have provisionally determined to E make recommendations under Clause (2) of Article 113 affecting any constituency, they shall inform the Speaker of the House of Representatives and the Prime Minister accordingly, and shall publish in the *Gazette* and in at least one newspaper circulating in the constituency a notice stating:

(a) the effect of their proposed recommendations, and (except in a case F where they propose to recommend that no alteration be made in respect of the constituency) that a copy of their recommendations is open to inspection at a specified place within the constituency;

(b) that representations with respect to the proposed recommendations may be made to the Commission within one month after the G publication of such notice,

and the Commission shall take into consideration any representations duly made in accordance with any such notice.

5. Where, on the publication of the notice under section 4 or a proposed H recommendation of the Election Commission for the alteration of any constituencies, the Commission receive any representation objecting to the proposed recommendation from:

(a) the State Government or any local authority whose area is wholly or partly comprised in the constituencies affected by the recommendation; or I

A (b) a body of one hundred or more persons whose names are shown on the current electoral rolls of the constituencies in question,

the Commission shall cause a local enquiry to be held in respect of those constituencies.

B **[38]** The Supreme Court in the case of *Ahmad Bahrom Datuk Hj Abu Bakar Titingan v. Tan Sri Hj Mohd Sunoh Marso & Ors* [1985] 1 LNS 3; [1987] 2 MLJ 718 held as follows:

With regard to the second question, our view is that the Election Commission performs its function under the Constitution. Its functions are clearly set out in Article 113 of the Federal Constitution, that is, C subject only to the provisions of the Federal law, to conduct elections to the House of Representatives and the Legislative Assemblies of the States.

[39] This court in *See Chee How & Anor*'s case *(supra)* in reversing the High Court's decision held that the learned judge was wrong in requiring the D Election Commission to furnish the detailed particulars to the respondent as there was no requirement under the Federal Constitution for any details to be put in the notice because the detailed particulars required by the Federal Constitution had already been put in the proposed recommendations which were accessible to the respondents at the designated location.

E **[40]** It is submitted by learned counsel for the appellant that the right to information is derived from, or is implicit in, the freedom of expression housed under art. 10(1)(a) of the Federal Constitution. In *Sivarasa Rasiah*'s case, *(supra)*, Gopal Sri Ram FCJ said at p. 519 (CLJ); pp. 343-344 (MLJ):

F Article 10 contains certain express and, by interpretive implication, other specific freedoms. For example, the freedom of speech and expression are expressly guaranteed by art 10(1)(a). The right to be derived from the express protection is the right to receive information, which is equally guaranteed: See *Secretary, Ministry of Information and Broadcasting, Government of India v. Cricket Association of Bengal* AIR 1995 SC 1236.

G **[41]** This is the position also adopted by the Indian, Canadian and the English courts. In India, the Right to Information Act 2005 came on the statute book on 15 June 2005 to provide an effective framework for effectuating the right to information recognised under art. 19 of the Constitution of India. "The expression the "Right to Information" has been H defined in s. 2(j) to include the right to inspection of work, documents, records, taking certified samples of materials, taking notes and extracts and even obtaining information in the form of floppies, tapes, video cassettes etc." see the Supreme Court case of India *Namit Sharma v. Union of India* [2013] 1 SCC 745.

I **[42]** It is also submitted that there is no need for freedom of information legislation to be enacted. In other words, in the absence of any Federal legislation, it is not an impediment to recognise the right to information. In

the Canadian case of *Ontario*, (*supra*), the Canadian Supreme Court held that s. 2(b) of the Canadian Charter of Rights and Freedoms (on freedom of opinion and expression) in itself permits the right to information. Mc Lachlin CJ and Abella J said at pp. 834-835:

> To show that access would further the purposes of s. 2(b), the claimant must establish that access is necessary for the meaningful exercise (page 835) of free expression on matters of public or political interest: see *Irwin Toy*, at pp. 976 and 1008; *Thomson Newspapers Co v. Canada (Attorney General)*, [1998] 1 SCR 877. On this basis, the Court has recognised access to information under s. 2(b) in the judicial context: "members of the public have a right to information pertaining to public institutions and particularly the courts" (*Edmonton Jurnal v. Alberta (Attorney General)*, [1989] 2 SCR 1326, at p. 1339). The "open courts" principle is "inextricably tied to the rights guaranteed by s. 2(b)" because it "permits the public to discuss and put forwards opinions and criticisms of court practices and proceedings" (*Canadian Broadcasting Corp v. New Brunswick (Attorney General),* [1996] 3 SCR 480, at para 23 per La Forest J).

[43] The information sought by the appellant, according to his learned counsel, was necessary for the meaningful exercise of free expression on matters of public or political interest within the sense expressed in *Ontario*, *(supra)*.

[44] However, neither the Indian nor the Canadian position bind our court on constitutional issues. Perhaps they may enlighten us and we may learn from their experiences. Unlike India, we do not have a specific statute such as the Right to Information Act 2005 which provides an elaborate and comprehensive matter on right to information. Neither do we have similar freedom of opinion and expression under s. 2(b) of the Canadian Charter of Rights and Freedoms which clearly permits an access to information under s. 2(b). But what we take pride of and observe is our Constitution which stands in its own right and it is in the end the wording of our Constitution itself that is to be interpreted and applied and this wording "can never be overridden by the extraneous principles of other Constitutions." Raja Azlan Shah J (as His Royal Highness then was) in *Loh Kooi Choon v. Government of Malaysia* [1975] 1 LNS 90; [1977] 2 MLJ 187 said at pp. 188-189 as follows:

> Whatever may be said of other Constitutions, they are ultimately of little assistance to us because our Constitution now stands in its own right and it is in the end the wording of our Constitution itself that is to be interpreted and applied and this wording "can never be overridden by the extraneous principles of other Constitutions" - see *Adegbenro v. Akintola & Anor*. Each country frames its constitution according to its genius and for the good of its own society. We look at other Constitutions to learn from their experiences and from a desire to see how their progress and well-being is ensured by their fundamental law.

[45] The interpretative principles of our Constitution in the case of *Loh Kooi Choon (supra)*, was followed by the Federal Court in *PP v. Kok Wah Kuan* [2007] 6 CLJ 341; [2008] 1 MLJ 1 where Abdul Hamid Mohamad PCA (as His Lordship then was) held at p. 355 (CLJ); p. 17 (MLJ):

> [18] So, in determining the constitutionality or otherwise of a statute under our Constitution by the court of law, it is the provision of our Constitution that matters, not a political theory by some thinkers. As Raja Azlan Shah FJ (as His Royal Highness then was) quoting Frankfurter J said in *Loh Kooi Choon v. Government of Malaysia* [1977] 2 MLJ 187 (FC) said: "The ultimate touchstone of constitutionality is the Constitution itself and not any general principle outside it.

[46] Having regard to our homegrown interpretative constitutional principles in *Loh Kooi Choon (supra)* and *Kok Wah Kuan (supra)*, we agree with the learned High Court Judge's decision which is summarised and produced in para. 7(i), (ii), (iii), (iv), (v), (vi), (vii), (viii) and (ix) in the early part of this judgment.

[47] Based on the above, the appellant's originating summons is therefore clearly without merit and the application should be refused *in limine* as the action is in essence an action to challenge the respondent's constitutional functions and duties as provided by the FC.

Conclusion

[48] The duties and responsibilities of the respondent have been specified by art. 113 of the Federal Constitution and s. 5 of the Elections Act 1958. There is nothing in both the Federal Constitution and the Elections Act 1958 or other express statutory provisions which require the respondent to do what the appellant is asking for from the court.

[49] The appellant's action is clearly seeking a "clocked declaration", meaning a declaration for a collateral purpose or with improper motive: see *Sakapp Commodities (M) Sdn Bhd (supra)*. The court cannot flagrantly override an express provision of the Federal Constitution.

[50] Based on the foregoing, the appeal is dismissed with no order as to cost and the decision of the learned High Court Judge is hereby affirmed.